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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. **76-681**

THE NATIONAL BANK OF NORTHERN NEW YORK AS
EXECUTOR OF THE LAST WILL AND TESTAMENT OF
ELIZABETH M. HAAS, DECEASED, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

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UNITED STATES OF AMERICA, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI
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The National Bank of Northern New York, as Executor of the Last Will and Testament of Elizabeth M. Haas, deceased, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on August 19, 1976.

OPINION BELOW

The opinion of the District Court is reproduced in the Appendix to this Petition. It has not been reported. The opinion delivered by the Court of Appeals has been officially reported at 540 F.2d 579 (2d Cir. 1976) and has been unofficially reported at 76-2 U.S. Tax Cas. ¶ 13,150 and at 38 Am. Fed. Tax R.2d ¶ 148,104; it is reproduced in the Appendix to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on August 19, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a bequest of funds, the income of which is to be used solely for the maintenance, care and improvement of a non-profit cemetery organized in 1853 to relieve the city of Watertown, New York of the burden of maintaining a municipal cemetery, is deductible from the gross estate in computing the federal estate tax.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be * * * deprived of * * * property, without due process of law;

Internal Revenue Code of 1954 (26 U.S.C.):

Section 2055. *Transfers for Public, Charitable, and Religious Uses.*

(a) In general—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be

determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers * * *—

* * *

(2) to or for the use of any corporation organized and operated exclusively for religious; charitable, scientific, literary, or educational purposes including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

(3) to a trustee or trustees, * * * but only if such contributions or gifts are to be used by such trustee or trustees, * * * exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no substantial part of the activities of such trustee or trustees, * * * is carrying on propaganda, or otherwise attempting, to influence legislation, and such trustee or trustees, * * * does not participate in, or intervene in (including the publishing and distributing of statements), any political campaign on behalf of any candidate for public office; * * *

STATEMENT OF THE CASE

Elizabeth M. Haas of Watertown, New York, died on January 15, 1966, leaving an estate of more than \$6.2 million, most of which she bequeathed to various entities which she considered charitable. Specific be-

quests were left to individuals and to various charities such as the United Negro Colleges, the American Cancer Society, Mercy Hospital of Watertown, New York, and St. Patrick's Orphanage of Watertown, New York. A specific bequest of \$25,000 was made for the care and maintenance of the Frederick Wetterhahn Family Burial Plot in the cemetery operated by the Grove Cemetery Association of LaFargeville, New York. The residue of the estate, almost \$5 million, was left to The Rector, Churchwardens and Vestrymen of Trinity Church, Watertown, New York and The Watertown Cemetery Association. The residue was to be "divided equally between the two corporations, such amounts to be added to their respective Endowment Funds, and the income only to be used."

In the early 1850's the small cemetery on Arsenal Street maintained by the Village of Watertown since 1824 was nearing its capacity and the Village Trustees, recognizing the need to obtain additional burial plots either by enlarging the existing cemetery or by acquiring a new site, obtained an option to purchase land outside the Village limits. On September 1, 1853 several of the citizens of Watertown formed the Watertown Cemetery Association to exercise the option and own and maintain a cemetery instead of the village. This was done, the purchase was completed on July 31, 1854, and the Watertown Cemetery Association has owned and maintained the cemetery ever since.

The sole purpose of the Watertown Cemetery Association is "procuring and holding lands to be used exclusively for a cemetery or a place for the burial of the dead." The sole activity of Watertown Cemetery Association has always been the ownership, operation and maintenance of a cemetery known as Brookside, which

is approximately two miles from the City of Watertown, New York, and is comprised of approximately 162 acres of land. In connection with its operation of Brookside Cemetery, the Watertown Cemetery Association, has, over the years, performed various ancillary acts for the public good such as the rehabilitation of an adjacent cemetery known as the Old Burrville Burying Ground and the construction of a public road from the city limits to the cemetery. The activities of the Association have relieved the Village, now City, of Watertown, of the burden of maintaining a public cemetery other than the old, filled cemetery on Arsenal Street which it has continued to maintain.

In 1882 the Watertown Cemetery Association established a fund, payments to which are held in trust and the income of which is used to maintain cemetery plots. Plot owners making payments to the fund were relieved from further annual assessments. Amounts paid into the fund for many of the plots do not now produce sufficient income to pay the present-day cost of care of those plots. Furthermore, there are 497 plots for which no perpetual care payments were ever made and, of these, the owners of only 30 plots are presently paying annual assessments. Nevertheless, all cemetery plots for which no perpetual care payment was ever made and for which annual assessments are not paid receive the same care and maintenance as the remaining plots in the cemetery for which provision has been made.

The property bequeathed by Miss Haas has been established as the Elizabeth M. Haas Memorial Fund. The income from this fund, like the income from the perpetual care fund, is used for the care, maintenance, and improvement of Brookside Cemetery.

Grove Cemetery Association was incorporated on August 14, 1869 for the sole purpose "of procuring and holding lands to be used exclusively for a cemetery or place of burial of the dead." The sole activity of Grove Cemetery Association is the ownership, operation and maintenance as a cemetery of approximately five acres of land on the outskirts of LaFargeville, New York. On and after January 15, 1966 Grove Cemetery would have required the sum of \$2,000 to establish a fund to provide for perpetual care of the Frederick Wetterhahn Family Plot, including replacements, care of sod, cleaning and pointing up the monument, and care and cleaning of the markers on said plot at least once every three years. The income on the balance of the legacy of \$25,000 may be used in the general care of the cemetery.

Watertown Cemetery Association and Grove Cemetery Association were incorporated pursuant to Chapter 133 of the New York Laws of 1847 entitled "An Act Authorizing the Incorporation of Rural Cemetery Associations." At the time of Miss Haas' death both associations were governed by the New York Membership Corporation Law (now N.Y. Not-For-Profit Corporation Law (McKinney 1970)).

The only revenues of both Grove Cemetery Association and Watertown Cemetery Association are from the sale of burial plots, charges for the care and maintenance of burial plots, income from endowments and from funds set aside for maintenance purposes, gifts and bequests.

Deductions for the bequests to the Watertown Cemetery Association and the Grove Cemetery Association were claimed on the federal estate tax return filed by

the executors on behalf of the estate. The Internal Revenue Service denied these deductions. The estate paid the resulting tax deficiency, filed a claim for refund of the disputed tax, and subsequently filed this suit for refund. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1346(a)(1). The United States District Court for the Northern District of New York held for the defendant, the United States, and the United States Court of Appeals for the Second Circuit affirmed, Judge Anderson dissenting.

REASONS FOR GRANTING THE WRIT

I. The Construction of the Word Charitable by the Court Below Conflicts with the Construction of the Word Charitable by Other Courts of Appeals.

The court below held that a bequest, the income from which is to be used for the maintenance of a community cemetery, was not charitable in spite of the intent of the testatrix and the purpose of the bequest to promote the public good. The court based its decision on a very restricted interpretation of the term charitable as used in Section 2055 of the Internal Revenue Code. This interpretation is in conflict with the interpretation of other Courts of Appeals, with regulations and revenue rulings issued by the Treasury Department and the Internal Revenue Service, and with the legal meaning which most commentators accord to the word "charitable".

The court below held that the bequest in question was not charitable because it will not be used exclusively for eleemosynary purposes, *i.e.*, relief of the poor. The court interpreted its earlier decision, in *Dulles v. Johnson*, 273 F.2d 362 (2d Cir. 1959) *cert. denied*, 364 U.S. 834, that various bar associations were charitable, as relying

on the educational and eleemosynary activities of the bar associations:

The activities of the associations in this case are not, as in *Dulles*, historically infused with such charitable functions as the provision of needed services for free, or at low cost, for those who cannot otherwise afford them. * * * (App. 23a).

The court quoted *Schuster v. Nichols*, 20 F.2d 179, 181 (D. Mass. 1927):

The position of the word "charitable", in a sentence including religious, scientific, and educational purposes, all of which would be regarded as charitable purposes under the statute of 43 Eliz., points irresistably to the conclusion that Congress was here using the word "charitable" in its more narrow and restricted sense, as signifying those corporations which were organized and maintained exclusively for eleemosynary purposes.

In *Schuster v. Nichols*, although it adopted a narrow construction, the Court recognized that, since before the Statute of Elizabeth, the term charitable has been generally interpreted to include much more than merely eleemosynary. Such a broad construction has been accepted by the Treasury Department in regulations interpreting the word charitable for income tax purposes. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1976):

The term "charitable" is used in section 501(c)(3)¹ in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other

¹ Section 501(c)(3), Int. Rev. Code of 1954, uses the identical phrase in issue for estate tax purposes in this case: "religious, charitable, scientific, literary or educational purposes" except Section 501(c)(3) adds one more exempt purpose: "testing for public safety".

tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. * * *

Consistently with this regulation, the Internal Revenue Service has ruled that a broad range of activities are charitable even though they are not eleemosynary in nature. Recently the following organizations have, *inter alia*, been ruled to be charitable:

1. An organization formed and supported by residents in an isolated rural community to provide a medical building and facilities at reasonable rent to attract a doctor who would provide medical services to the entire community. Rev. Rul. 73-313, 1973-2 Cum. Bull. 174.

2. An organization created to foster the development in a community of an appreciation for drama and musical arts by sponsoring professional presentations for which admissions are charged. Rev. Rul. 73-45, 1973-1 Cum. Bull. 220.

3. A volunteer fire company which provides fire protection and ambulance and rescue services. Rev. Rul. 74-361, 1974-2 Cum. Bull. 159.

4. An organization formed to promote the art of filmmaking by conducting annual festivals to provide unknown independent filmmakers with opportunities to display their films and by sponsoring symposiums on filmmaking. Rev. Rul. 75-471, 1975-2 Cum. Bull. 207.

The recent rulings adopting an expansive interpretation of the term charitable illustrate the current stage in an ongoing evolution of the term charitable. Over the years more and more activities have been recognized as charitable in nature. The government itself recog-

nized this in its brief to this Court in *Eastern Kentucky Welfare Rights Organization v. Simon*, Nos. 74-110 and 74-1124, "This expansion in the concept of 'charitable' reflects the fact that the law of charitable trusts has always included a category for purposes beneficial to the community, which has traditionally expanded in order to meet the needs of a changing society." (citations omitted) Brief for Respondent at 87.

An expansive interpretation of the term "charitable" has also been adopted by several of the Court of Appeals. The decision of the Second Circuit in this case is in conflict with such decisions.

In *Bok v. McCaughn*, 42 F.2d 616, 619 (3rd Cir. 1930), for example, the Court held a trust for the purpose of making awards to citizens performing notable public services to be charitable, quoting Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen 556 (Mass. 1867), to the effect that a charitable gift is one "for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

More recently, the Eighth Circuit, in an opinion by Mr. Justice Blackmun, held that the Bar Association of St. Louis was organized for charitable purposes because it "performs a public service and benefits the public or relieves it of a burden which otherwise belongs to it." *St. Louis Union Trust Company v. United States*, 374 F.2d 427, 432 (8th Cir. 1967). *Accord*, *Dulles v. Johnson*, 273 F.2d 362 (2nd Cir. 1959).

Similarly, the Ninth Circuit has held a public parking garage erected by a group of private business and professional people to be charitable since it relieved the local government of a burden of local government. *Monterey Public Parking Corp. v. United States*, 481 F.2d 175 (9th Cir. 1973), *affirming* 321 F. Supp. 972 (N.D. Cal. 1970). *See also*, *Old Colony Trust Co. v. United States*, 438 F.2d 684 (1st Cir. 1971) (bequest to Canadian public hospital); *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated and remanded on other grounds*, 96 S. Ct. 1917 (charitable status of hospital).

The commentators, like the Courts cited above, agree that the term charitable has a broad legal meaning which extends far beyond the eleemosynary purposes required by the Second Circuit. Professor Scott, for example, states that trusts for governmental or municipal purposes or the promotion of health are clearly charitable. He quotes the definition of Mr. Justice Gray who said, "a charity, in the legal sense, may be more fully defined as a gift . . . for the benefit of an indefinite number of persons . . . [by] lessening the burdens of government" and states that it is not broad enough. IV A. Scott, *The Law of Trusts* 2854 (3d ed. 1967). Similarly, the *Restatement (Second) of Trusts* lists a broad range of charitable purposes and points out that a purpose is charitable if its accomplishment is of such social interest to the community as to justify permitting property to be devoted to the purpose in perpetuity. *Restatement (Second) of Trusts*, §§ 368; 374 (1959).

A community cemetery, such as the Watertown Cemetery Association, is clearly an organization which operates for the broad, public good. This is specifically

recognized in Comment h to Section 374 of the *Restatement (Second) of Trusts* which distinguishes between trusts for the maintenance of private graves or tombs and trusts for public cemeteries: "But a trust for the maintenance of a public cemetery or churchyard is charitable." Similarly, various state legislatures have specifically recognized the charitable nature of cemeteries. New York, for example, provides that dispositions in trust for the maintenance of private, as well as public, cemeteries shall be deemed to be for charitable and benevolent purposes. N. Y. Estates, Powers and Trusts Law § 8-1.5 (McKinney 1967).

Associations such as the Watertown Cemetery Association and bequests such as those here at issue, save cities such as Watertown from the responsibility, set forth in Section 291 of the New York Town Law, of caring for cemeteries. (McKinney 1965). Were it not for the Watertown Cemetery Association, the City of Watertown would now be maintaining Brookside Cemetery just as it now maintains the old, filled cemetery on Arsenal Street. The Association was formed to purchase, develop and maintain a cemetery which, in the absence of the Association, would have been purchased, developed and maintained by the Village, now City, of Watertown. The Income Tax Regulations specifically recognize that "lessening of the burdens of Government" is a charitable purpose. § 1.501(c)(3)-1(d)(3):

The Association confers a benefit upon the public by maintaining in perpetuity a large, parklike, green space near the city. This maintenance of open, green space, dedicated to proper respect for the dead, serves a charitable purpose similar to that of a public monu-

ment. This promotes the public welfare and, in itself, is a charitable purpose.

A cemetery operated by a cemetery association promotes public health as well as serving governmental purposes. Indeed, public cemeteries were generally developed in the mid-nineteenth century in both England and the United States to replace the unsanitary practice of burying the dead beneath church buildings and in crowded churchyards. 5 *Encyclopedia Britannica* 159 (1966). In England poor burial conditions led to the closing of the churchyards by the Burial Act of 1855. Thereafter, virtually all burials were in cemeteries similar to the one maintained in this country by the Watertown Cemetery Association. This has eliminated the menace to public health which unsanitary burials would create.

The conflict between the present narrow interpretation of the term charitable by the Second Circuit and the interpretation of charitable by other courts is not lessened by earlier decisions as to the status of community cemetery associations nor by the special income tax treatment accorded both private family and community cemeteries. The only other decision by a Court of Appeals denying a charitable deduction for a bequest to a non-profit cemetery association was decided 36 years ago. *Gund's Estate v. Commissioner*, 113 F.2d 61 (6th Cir. 1940), *cert. denied*, 311 U.S. 696. The court there, like the court below, based its decision on the erroneous premise that only eleemosynary organizations are charitable. The three lower court decisions which denied deductions for bequests to, or for the maintenance of, non-profit cemeteries, similarly relied on the absence of eleemosynary activities by the organizations involved. *Bank of Carthage v.*

United States, 304 F. Supp. 77 (W.D. Mo. 1969), *Estate of Arthur D. Haley*, 7 CCH Tax Ct. Memo 691 (1948), *Wilbur National Bank, Executor*, 17 B.T.A. 654 (1929). In all of those cases the courts assumed, without discussion, that an organization must be eleemosynary in nature to be charitable. The court below should not be allowed to perpetuate this erroneous interpretation of the term charitable.

The Second Circuit erroneously relied on the special income tax treatment accorded all non-profit cemetery associations under Sections 170(c)(5) and 501(c)(13) of the Internal Revenue Code. Those sections grant deductibility from income tax for donations to all non-profit cemetery associations as well as exemption from income tax for the income of such associations. Those sections are not limited to cemeteries which are charitable because of their public character. Rather, they apply even to private cemeteries which are not charitable, such as those operated for the benefit of members of a single family. *John D. Rockefeller Family Cemetery Corp.*, 63 T.C. 355 (1974). The fact that there is no similar estate tax provision means merely that bequests to or for the use of *private* cemetery associations are not deductible; it has no bearing on the issue whether a nonprofit *community* cemetery association is charitable.

The conflicting interpretations of the term "charitable" as used in Section 2055 of the Internal Revenue Code have great impact on the taxation of estates in general as well as on non-profit community cemetery associations. During 1972 deductions for charitable bequests were claimed on 21,257 of the 174,899 federal estate-tax returns filed. U.S. Internal Revenue Service, *Statistics of Income 1972—Estate Tax Returns*, 12,

14. Many of the bequests for which deductions were claimed must have been to organizations that would not be held charitable under the restrictive approach followed by the Second Circuit but would be held charitable under the broader approach adopted by the Third Circuit in *Bok*, the Eighth Circuit in *St. Louis Union Trust Co.*, and the I.R.S. in recent administrative rulings. Moreover, many other bequests to worthy organizations may be discouraged by the approach followed by the Court below. In particular, the many community cemetery associations which relieve the burdens of local government and promote the public good may well find themselves deprived of bequests which they would otherwise receive. A clear construction of the term charitable by this Court would alleviate the present uncertainty.

II. The Decision Below Adopts a Construction of Section 2055 Which Raises Substantial Questions of Constitutional Validity.

The Court of Appeals has held nondeductible the value of a bequest for the maintenance of a non-profit, non-sectarian cemetery having a close identification with the community and providing burial space for all community members. However, the value of a like bequest for the maintenance of an identical cemetery, if operated by a church, is deductible. As the dissenting opinion below aptly notes, such an application of Section 2055 embodies discrimination without apparent constitutional basis. (App. 33a)

The Fifth Amendment requires that no person be deprived of property without due process of law. The notion of due process includes the concept that every person is entitled to the equal protection of the law.

While equal protection claims may arise either under the Fifth Amendment with respect to the federal government, or under the Fourteenth Amendment with respect to the states, this Court has always approached them in precisely the same way. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2. Further, it is settled that a denial of equal protection may obtain by reason of the way in which a statute is construed and applied; redress of invidious discrimination repugnant to the Constitution is not limited to unlawful classifications established by the express terms of legislative enactments. *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 545.

It is stipulated in this case that the cemeteries operated by Watertown Cemetery Association and Grove Cemetery Association perform the same function as cemeteries operated by religious organizations. (Stipulation of Facts, ¶ 42.) Under the interpretation of Section 2055 approved by the majority of the Court of Appeals, testators, such as Elizabeth M. Haas, who clearly intend to make charitable bequests for the benefit of essentially identical non-profit cemeteries, are treated differently. Moreover, the distinction is drawn solely because one testator makes a bequest for the benefit of a cemetery affiliated with a church, while another makes a bequest for the benefit of a non-profit, non-sectarian cemetery operated by public-minded citizens for all members of the community without regard to their religious affiliation. This distinction appears to bear no rational relationship to the objective of Section 2055(a): encouraging testators to make bequests for the public good. *Commissioner v. Sternberger's Estate*, 348 U.S. 187, 190 n.3. On the contrary, the interpretation in the decision below will tend to deter

charitable bequests, in direct contravention of the legislative purpose. The maintenance for a community of a dignified burial ground is a public benefit, and a charitable activity, whether or not the burial ground is owned and operated by a church. The allowance of a deduction for a bequest for such maintenance if the cemetery is church-affiliated is a recognition of its charitable, not its religious, function. However, the Court of Appeals construed Section 2055(a) so as to make this church affiliation the determinative factor. Such a construction is questionable under the principle of equal protection.

The court below would allow or disallow the estate tax charitable deduction, depending solely upon a cemetery's religious affiliation. Such a construction raises another constitutional difficulty which this Court intended to lay to rest in *Walz v. Tax Commission*, 397 U.S. 664. This Court takes great care to observe "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669. In *Walz*, it is said: "... [W]e will not tolerate either governmentally established religion or governmental interference with religion." *Id.* The Court emphasized that "The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." *Id.* at 672. But where the testator's gift for public benevolence is favored if made to a sectarian organization and disfavored if made to an identical nonsectarian entity, a serious question of the establishment of religion arises. Since the essentially charitable organization and operation of the donee is the same in both instances, the inclusion of a religious test is no more relevant than would be the

use of such a test to determine whether a gift to a hospital is favored or disfavored.

The tax in question is imposed upon the transfer of the taxable estate. This Court is not faced with a question of possible direct sponsorship of, or interference or entanglement with, religion. It is faced with the question whether philanthropic bequests must satisfy a religious test. Since tax considerations largely influence the choice of legatees by informed testators, the effect of the distinction drawn by the Court of Appeals would be to promote church-operated cemeteries at the expense of nonsectarian community cemeteries not operated for profit. This result violates the requirement for a spirit of benevolent neutrality.

The distinction between nonsectarian and church-related cemeteries is not contained in the statutory provision allowing a deduction for bequests for charitable purposes. Section 2055(a)(2) allows an estate tax deduction for bequests to entities organized and operated exclusively for charitable purposes. Section 2055(a)(3) complements paragraph (2) by authorizing the same deduction from the value of the gross estate in the case of bequests in trust to be used exclusively for charitable purposes. Miss Haas' bequest was to an endowment fund for the maintenance of a non-profit, nonsectarian community cemetery. The religious or nonsectarian character of the owning entity should be immaterial in evaluating the charitable nature of this purpose. This was noted in the dissenting opinion below. Under such a reasoned interpretation, bequests of endowment funds to maintain religious cemeteries and to maintain non-profit, nonsectarian cemeteries would alike be eligible for deduction so

long as other statutory conditions are met. The satisfaction of these other statutory conditions is stipulated in this case. (Stipulation of Facts, ¶ 11).

If adopted by the Court, the interpretation of the statute suggested herein would make it unnecessary to address difficult and vexing issues under the First and Fifth Amendments.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

70-CY- 345

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN NEW
YORK, as Executors of the Last Will and Testament of
ELIZABETH M. HAAS, Deceased, and WATERTOWN CEMETERY
ASSOCIATION, *Plaintiffs*

v.

UNITED STATES OF AMERICA, *Defendant.*

APPEARANCES:

WILLMOTT, AYLWARD, WISNER,	HENRY H. WILLMOTT, Esq.
McALOON & SCANLON	JOHN V. AYLWARD, Esq.
425 Washington Street	Of Counsel
Watertown, New York 13601	

Attorneys for Plaintiffs,
Ruth K. Child and The
National Bank of Northern
New York, as Executors of
the Last Will and Testament
of Elizabeth M. Haas, Deceased

CONBOY, MCKAY, BACHMAN	LAWRENCE CONBOY, Esq.
& KENDALL	Of Counsel

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Watertown Cemetery Association

JAMES M. SULLIVAN, JR.	STEPHEN T. LYONS
United States Attorney	Trial Attorney
Northern District of New York	Tax Division
Federal Building	Department of Justice
Syracuse, New York 13201	Washington, D.C. 20530
Attorney for Defendant.	Of Counsel

EDMUND PORT, Judge

MEMORANDUM-DECISION AND ORDER

This is a refund action for the recovery of estate taxes allegedly erroneously and illegally assessed and collected from the plaintiffs, in the sum of \$916,085.78, by the executors of the estate of Elizabeth M. Haas. Jurisdiction is based on 28 U.S.C. § 1346(a)(1).¹

The parties have agreed on an extensive stipulation of facts. In addition, testimony of one witness called by the plaintiff was presented.

Facts

The plaintiff, The National Bank of Northern New York, is the surviving executor of the will of Elizabeth M. Haas, who died on January 15, 1966. Ruth K. Child is a co-executor of the will, but is now deceased. The dispute in this case arises out of the following bequests to the Grove and Watertown Cemetery Associations:

EIGHTH:

I give and bequeath to GROVE CEMETERY ASSOCIATION of LaFargeville, New York, the sum of Twenty-five Thousand Dollars (\$25,000.00), the income only to be used for the care and maintenance of the Frederick Wetterhahn Family Burial plot in said Cemetery, including replacements, care of sod, cleaning and pointing up the monument, and care and cleaning of the markers on said plot at least once every three years. Any surplus income may be used in the general care of the Cemetery.

¹ (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; • • •

TWENTY-FIRST:

All the rest, residue and remainder of my property, real and personal of every name and nature, I give, devise and bequeath to THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF TRINITY CHURCH, Watertown, New York and THE WATERTOWN CEMETERY ASSOCIATION, to be divided equally between the two corporations, such amounts to be added to their respective Endowment Funds, and the income only to be used.

The Watertown and Grove Cemetery Associations are corporations governed by the New York State Not-For-Profit Corporation Law. On April 3, 1967, the Haas executors filed with the Internal Revenue Service an estate tax return and paid a tax of \$106,644.33. On June 27, 1967, the Internal Revenue Service assessed against the estate an additional estate tax in the amount of \$920,367.36, which was paid by the executors under protest, with \$14,713.27 interest, on July 23, 1967. The executors filed with the Internal Revenue Service a claim for refund on April 2, 1969 and, on April 9, 1970, filed an amended claim for refund of \$935,096.66 of estate tax and interest already paid. In June, 1970, the executors were advised by the Internal Revenue Service that their claim had been disallowed to the extent of \$917,593.37. On or about August 21, 1970, the executors received a refund of \$19,010.88 and interest of \$3,487.58. The present action is brought to recover the difference of \$916,085.78 between the claim for refund and the amount of refund actually made. The difference represents the additional tax resulting from the disallowance of deductions to the cemeteries under 26 U.S.C. § 2055(a)(2)(3)² then in effect. The action was commenced timely.

² § 2055(a) *In General*.—For purposes of the tax imposed by Section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devices, or transfers (including the interest

The Issue

The issue before the court is whether the estate of Elizabeth M. Haas is entitled to a deduction for her bequests to the Grove Cemetery Association and the Watertown Cemetery Association pursuant to the provisions of 26 U.S.C. § 2055(a).

Plaintiffs' Contentions

The plaintiffs primarily contend that the Grove Cemetery Association and the Watertown Cemetery Association are charitable entities within the meaning of 26 U.S.C. § 2055(a). Therefore, the Haas estate is entitled to an estate tax deduction approximately equal to the bequests to the Cemetery Associations.³ The plaintiffs alternatively contend that the bequests are to be used for religious purposes, which would also entitle the estate to a deduction under

which falls into any such bequest, legacy, devise, or transfer, as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

(3) to a trustee or trustees, or a fraternal society, order or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation;

³ The bequests total approximately \$2.5 million.

§ 2055(a). Plaintiffs argue that the funds bequeathed to the Cemetery Associations are held in trust, rather than outright. Nevertheless, the plaintiffs also contend that, if the court determines that the funds are held outright, the estate is still entitled to a deduction.

Defendant's Contentions

Whether the bequested funds are held in trust or outright is considered of no importance by the defendant, United States. The defendant alleges, simply, that the Cemetery Associations are neither charitable nor religious within the meaning of 26 U.S.C. § 2055(a).

Additionally, the Government contends that the Watertown Cemetery Association named as a plaintiff is not a proper party to this suit. It is the Government's position that only the taxpayer, here the estate, is permitted to bring an action under 28 U.S.C. § 1346(a)(1).

The parties have stipulated that \$2,000.00 is the amount required to establish a fund to provide for perpetual care of the Frederick Watterhahn Family plot in the Grove Cemetery. That sum is, accordingly, removed from this controversy.

Discussion

CHARITABLE PURPOSES

The plaintiffs rely heavily on the case of *Dulles v. Johnson*, 273 F.2d 362 (2nd Cir. 1959) *cert. denied*, 364 U.S. 834 (1960). The *Dulles* case involved the estate of William Nelson Cromwell, a prominent New York City attorney. Cromwell specified in his will that the residue of his estate was to be divided among various groups and organizations. These organizations included the New York County Lawyers Association, the Association of the Bar of the City of New York, and the New York State Bar Association. The executors of the Cromwell estate filed a federal estate tax return, in which they claimed deductions from the gross

estate for the bequest to the three bar associations. The executors claimed that the associations were "charitable, scientific, literary or educational" within the meaning of § 812(d) of the 1939 Internal Revenue Code, 26 U.S.C. § 812 (d). Section 812(d) was the predecessor of 26 U.S.C. § 2055(a). In holding the bequests deductible under § 812 (d), the Court of Appeals considered the activities of the Bar Associations and, with regard to the Associations' regulation of the unauthorized practice of law, stated at 273 F.2d 366:

If these activities were not undertaken by the Associations, the cost of this necessary regulation would descend upon the public. Hence we conclude that as to regulation of the unauthorized practice of law the Associations must be deemed "charitable."

The Court of Appeals went on to conclude at page 368:

Looking at the total operations of the three Bar Associations we hold that they are "charitable, scientific * * * [and] educational" within the meaning of Section 812(d) and that the district court erred in disallowing deductions for the bequest to them. The judgment is reversed with respect to the disallowance of the deductions.

Plaintiffs contend that, like the Bar Associations they, too, *lessen the burden of government* and, therefore, are charitable. Plaintiffs' Trial Brief at page 25 states:

The principle laid down in *Dulles v. Johnson* is the *whole* point in the case presented. (emphasis added) We contend that the *sole* purpose for which Watertown Cemetery Association can use the income from the Haas bequest is the furnishing of a place to bury the dead, and the care and maintenance of that place; that if this activity were not undertaken by Watertown Cemetery Association and like associations, the cost thereof would devolve upon the public, since it is unthinkable that there would be no place to bury the dead; that the conclusion is therefore inescapable that this purpose is charitable within the meaning of Sec-

tion 2055(a)(3) I.R.C.; and that therefore this estate is entitled to a charitable deduction in the amount of the Haas bequest.

The force of plaintiffs' argument, although having a certain surface appeal, weakens upon examination. A corporation can qualify as exempt from paying income taxes and be considered as operating for a charitable purpose under 26 U.S.C. § 501(c)(3) upon the theory of a "[l]essening of the burdens of government."⁴ As will be developed later, § 501(c)(3) and the supplementing regulations do not apply to estate taxes.

The plaintiffs find support for the "[l]essening of the burdens of government"—charitable nexus in *Dulles* and other cases cited. *Dulles* and the plaintiffs' supporting cases are distinguishable factually from the case at bar. None relate to a charitable deduction claimed by a cemetery association.⁵ The facts indicating a "[l]essening of the bur-

⁴ See, 26 C.F.R. § 1.501(c)(3)-1(d)(2).

⁵ *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), cert. granted, 43 U.S.L.W. 3613 (U.S. May 19, 1975) [Revenue Ruling 69-545, which defines criteria necessary for a nonprofit hospital to qualify as a charitable organization under 26 U.S.C. § 501(c)(3) (Income Tax Exemption) is upheld]; *St. Louis Union Trust Co. v. United States*, 374 F.2d 427 (8th Cir. 1967) (Bar association held charitable within meaning of 26 U.S.C. § 2055(a) on facts similar to *Dulles*); *Kaplun v. United States*, 303 F.Supp. 733 (D.C. N.Y. 1969), aff'd, 436 F.2d 799 (2d Cir. 1971) [Bequest to State of Israel of coin collection, to be exhibited in a museum qualified for a charitable deduction under 26 U.S.C. § 2055(a)]; *Krohn v. United States*, 246 F.Supp. 341 (D. Colorado 1965) (Denver Medical Society not operated exclusively for charitable purposes under 26 U.S.C. § 2055(a) estate tax deduction denied); *Hammerstein v. Kelley*, 235 F.Supp. 60 (E.D. Missouri 1964), aff'd, 349 F.2d 928 (2d Cir. 1965) (St. Louis Medical Society not operated exclusively for charitable purposes under 26 U.S.C. § 2055(a), estate tax deduction denied); *Industrial National Bank of Providence v. United States*, 187 F.Supp. 810 (D. Rhode Island 1960) [Providence Art Club operated exclusively for educational purposes, including the encouragement of art; estate tax deduction allowed under 26 U.S.C. § 2055(a)].

dens of government" found in the cases granting deductions are not found here. Unlike the *Dulles* case, here, even the cost of burial of the indigent "descend[s] upon the public".⁶ In the few cases in which a charitable deduction from an estate tax was sought by reason of a charitable contribution to a cemetery association, the courts have refused to allow it.⁷

Statutory Treatment of Cemetery Associations

The manner in which Congress has specifically dealt with cemetery associations in the taxing statutes is significant. In 26 U.S.C. § 501(c)(3), "religious, charitable, scientific, . . ." corporations are exempted from the paying of income tax. In a separate section, 26 U.S.C. § 501(c)(13) nonprofit cemetery companies are also exempted. Section 170(c)(2) provides that a contribution or gift to a corporation "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals" is to be allowed as an income tax deduction. Again, in a separate paragraph, 26 U.S.C. § 170(c)(5) specifically provides that a gift to a nonprofit cemetery company is, likewise, made deductible. Congress' continued separate treatment of charitable corporations and cemetery associations strongly suggests that the legislature views them as separate and distinct entities. This view is clearly demonstrated in the legislative history of the 1954 Internal Revenue Code. The 1939 Internal Revenue Code contained a provision similar

⁶ Stipulation of Facts, ¶ 39.

⁷ *Gund's Estate v. Commissioner of Internal Revenue*, 113 F.2d 61 (7th Cir.) [sic], cert. denied 311 U.S. 696 (1940); *Carthage v. U.S.*, 304 F.Supp. 77 (W.D. Mo. 1969); but see, *Estate of Elizabeth L. Audenried v. Commissioner of Internal Revenue*, 26 T.C. 120, acquiesced in by the Commissioner, 2 C.B. 4 (1956) (estate tax deduction in the amount of bequest to a church-affiliated cemetery allowed on grounds that cemetery was religious within meaning of estate tax statute).

to § 170(c)(2), but did not contain a provision similar to § 170(c)(5), dealing with deductions for contributions to cemetery associations. The Senate report on the Internal Revenue Code of 1954 states with reference to § 170(c)(5):

Your committee's bill extends the deduction for charitable contributions beyond those allowed under present law to contributions made to non profit cemetery and burial companies. (1954 U.S. Code Congressional and Administrative News, 4660) (See, also, 1954 U.S. Code Congressional and Administrative News, 4843-46, 5289).

The provisions of the Internal Revenue Code which pertain to the instant case are 26 U.S.C. §§ 2055(a)(2), (3). These two sections deal with estate tax deductions for contributions to either a corporation or to a trustee, where the corporation is organized and operated for "religious, charitable, scientific, literary, or educational purposes . . ." or where the trustee will use the gift for "religious, charitable, scientific, literary or educational purposes. . . ." This language is virtually identical to 26 U.S.C. § 170(c)(2) and 26 U.S.C. § 501(c)(3). However, in the estate tax area, there is no separate section dealing with cemetery associations; nor has a regulation paralleling 26 C.F.R. § 1.501(c)(3)-1(d)(2) as interpreted in Revenue Ruling 69-545⁸ been promulgated and adopted applying the community benefit concept to cemetery association legatees under § 2055(a). Where Congress has wished to provide for special tax treatment of cemetery associations, it has done so specifically; the absence of a provision dealing with cemetery associations in the estate tax area is highly significant. The latest case to deal with this problem is *The Bank of Carthage v. United States*, 304 F. Supp. 77 (W.D. Missouri 1969). In *The Bank of Carthage* case, one John Carter devised

⁸ See, *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), cert. granted 43 U.S.L.W. 3613 (U.S. May 19, 1975).

real property known as the Oak Hill Cemetery in trust for the operation and improvement of the Cemetery. The executor of the Carter estate took the position that the devise of the Cemetery was not subject to estate tax because it was a charitable transaction. The federal government disagreed, and an estate tax deficiency was assessed. The Bank of Carthage, as trustee under the will, then brought an action against the United States to recover the deficiency which it had paid. The contentions of the Bank of Carthage in that case are similar to the arguments made by the plaintiffs here. In *Carthage*, the executor argued that the Oak Hill Cemetery was charitable within the meaning of 26 U.S.C. § 2055(a)(2). Carter's executor reasoned that, inasmuch as the Internal Revenue Service had granted the Oak Hill Cemetery an exemption from federal income tax under the provisions of 26 U.S.C. § 501(c)(13), the same type of exemption should apply in the estate tax area. The *Carthage* court, however, found for the United States. It first pointed out that "[a] non-profit cemetery is not per se qualified for the estate tax exemption of Section 2055(a)(2) as that law is presently written". Answering the plaintiff's argument based on § 501(c)(13), the court responded at pages 80-81:

The short answer is that the estate tax statutes do not contain the counterpart of income tax Section 501(c)(13). Its absence in the estate tax statutes, illustrates if anything, an intent by Congress not to include as an estate tax exemption, the exemption set out in Section 501(c)(13) to estate tax situations. . . . It is exclusively the province of Congress in its wisdom to determine whether it wishes to provide in its estate tax statutory exemptions all those appearing in its statutory income tax exemptions.

Thus, on facts very similar to those present in the instant case, an estate tax deduction was not allowed.

In *Gund's Estate v. Commissioner of Internal Revenue*, 113 F.2d 61 (6th Cir.) cert. denied, 311 U.S. 696 (1940), an

estate tax deduction equalling the value of a bequest to the Oak Grove Cemetery Association was also disallowed. While the *Gund* case dealt with a predecessor to 26 U.S.C. § 2055(a), its reasoning is applicable to the instant case. At 113 F.2d 63-64, the *Gund* court stated:

As was stated by the Board of Tax Appeals in *Craig v. Commissioner*, 11 B.T.A. 193,200: " * * From the first revenue act to the last, Congress has consistently and persistently placed charitable and religious institutions in one class and cemeteries not operated for gain in a distinct and separate class; that wherever provision has been made permitting deduction by individuals of gifts and contributions, one class has been included and the other not mentioned; and, finally, when Congress determined that it was proper that income paid to or set aside for such cemeteries should be permitted as a deduction, such intention was made evident in no uncertain manner and such cemeteries were described with most meticulous exactness. We should not join together classes which Congress has seen fit to put asunder. Looking to all the provisions of the Revenue Act of 1921, we find that Congress did not include cemeteries not operated for gain in the category of religious or charitable corporations and that this intention runs through all the revenue acts enacted prior and subsequent to the Revenue Act of 1921."

While the *Schuster* and *Craig* cases dealt with income rather than estate tax, we are of the opinion that this does not affect the validity of the reasoning therein.

The legislative history and the cases which deal with estate tax deductions for contributions to cemetery associations make it transparently clear that cemetery associations per se are not charitable or religious within the meaning of 26 U.S.C. § 2055(a).

The *Gund* court observed at 113 F.2d 62 that "[a] cemetery association doubtless could be so organized and oper-

ated as to be a charitable organization within the meaning of the act. . . .”.

The record in this case considered as a whole fails to disclose activities warranting such a finding. The Cemetery Associations did not make it a practice of providing free burial to indigents, nor is it their usual custom to provide any plots at reduced prices. At paragraph 34 of the stipulation of facts, the plaintiffs outline a list of activities which might arguably bring them within the Act. However, most of the activities cited were done long ago and, certainly, are not a continuing practice of the Associations. The plaintiffs point out that the Watertown Cemetery Association provides a receiving vault where the remains of persons dying during the winter months may be stored. The Association allows other cemeteries and the city to use this facility. However, at the time of the hearing, it was disclosed that the Watertown Cemetery Association makes a charge for the use of their storage facility.⁹ Plaintiffs also point out that there are a number of grave sites for which no contribution was ever made into the perpetual care fund or for which the contribution made is now insufficient to provide for upkeep. Nevertheless, the Cemetery Associations maintain these plots. The Cemetery Associations do not pay for this care themselves, however; it is made possible by the contribution of others.¹⁰ On all of the above, I find that the Watertown and Grove Cemetery Associations are neither charitable corporations nor established exclusively for charitable purposes within the meaning of 26 U.S.C. § 2055(a).

Religious Purposes

The plaintiffs also contend that the Cemetery Associations perform a religious function and, therefore, are en-

⁹ Transcript, page 52.

¹⁰ See, Statement of Plaintiff's Attorney, Transcript, page 21.

titled to an estate tax deduction under § 2055(a). The plaintiffs' expert, Doctor Milton Gatch, Professor and Chairman of the Department of English at the University of Missouri, gave his opinion, as a religious expert, subject to objection, that a not-for-profit cemetery corporation which furnishes and maintains a place for the interment of dead human bodies performs a religious function or purpose. Having reserved my ruling on the admissibility of Doctor Gatch's deposition¹¹ and written statement,¹² they are received. I find the Cemetery Associations here are not "religious" in fact or within the meaning of § 2055(a).

The same reasoning, applied earlier, which precludes a cemetery association from being a charitable entity within the meaning of § 2055(a) likewise precludes a cemetery association from being religious for estate tax purposes. Congress has continuously treated religious institutions and cemeteries as separate and distinct entities and it has chosen not to include contributions to the latter as estate tax deductions. Moreover, the record here indicates that the Watertown and Grove Cemetery Associations, in actuality, perform no religious functions. The cemetery Associations provide for the care and maintenance of the cemetery grounds. At the time of a burial, employees of the Associations dig the grave, provide and man the lowering device and later fill the grave. Any prayers or religious ceremonies performed in connection with the burial are performed by clergymen or others in no way associated with the Cemetery Associations. The Cemetery Associations are not affiliated with any church, and plaintiffs' counsel pointed out that the Cemetery Associations refused burial to no one and that an atheist would absolutely be allowed burial in the Cemeteries involved.¹³

¹¹ Plaintiffs' Exhibit 1.

¹² Plaintiffs' Exhibit 1A.

¹³ Transcript, page 22.

In his written statement, Doctor Gatch actually concludes that cemetery associations are charitable, not religious.¹⁴ As noted before, this is one form of charity that Congress has not seen fit to include in 26 U.S.C. § 2055(a). The expert's opinion as to what constitutes religious purposes is so broad and amorphous as to render it meaningless for tax exemption purposes. He virtually equates it with goodness. The Watertown and Grove Cemetery Associations are not operated exclusively for religious or charitable purposes, nor were the bequests to them to be used exclusively for such purposes within the meaning of § 2055(a).

Cemetery Association as Plaintiff

The defendant, United States, contends that the Watertown Cemetery, named as a plaintiff, is not a proper party to this suit. The Government argues that only the taxpayer, here the estate, is permitted to bring an action under 28 U.S.C. § 1346(a)(1). The Government's position finds support in this and other circuits.¹⁵ The Watertown Cemetery Association will be dropped as a plaintiff and its cause of action against the United States dismissed for lack of jurisdiction.

Findings of Fact and Conclusions of Law

The facts set forth in a written stipulation of the parties, a copy of which is attached hereto and made a part hereof, as supplemented by the findings of fact and conclusions of law in this Memorandum-Decision and Order shall con-

¹⁴ Plaintiffs' Exhibit 1A, A Statement on the Religious Functions of Cemeteries, pages 9-10.

¹⁵ *Eighth Street Baptist Church, Inc. v. United States*, 431 F.2d 1193 (10th Cir. 1970); *Phillips v. United States*, 346 F.2d 999 (2nd Cir. 1965); *First National Bank of Emlenton, Penn. v. United States*, 265 F.2d 297 (3rd Cir. 1959). See, *Hofheinz v. United States*, 511 F.2d 661 (5th Cir. 1975).

stitute the findings of fact and conclusions of law pursuant to Rule 52 F.R.Civ.P.

I conclude that:

(1) except as to the claim of the plaintiff, Watertown Cemetery Association, the court has jurisdiction of the parties and subject matter of this action;

(2) the bequests in issue are not deductible from the gross estate of Elizabeth M. Haas under 26 U.S.C. § 2055 (a)(2) or (3); and

(3) judgment should be entered in favor of the defendant, United States of America, dismissing the complaint herein.

For the reasons herein, it is hereby

ORDERED, that the claim of the plaintiff, Watertown Cemetery Association be and the same hereby is dismissed for lack of jurisdiction; and it is further

ORDERED, that judgment be granted in favor of the defendant, United States of America and against the plaintiff executors of the Last Will and Testament of Elizabeth M. Haas, deceased, dismissing the complaint on the merits.

/s/ EDMUND PORT
United States District Judge

Dated: December 10, 1975
Auburn, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1024-25—September Term, 1975.

(Argued May 21, 1976 Decided August 19, 1976.)

Docket Nos. 76-6030, -6036

RUTH K. CHILD and THE NATIONAL BANK OF NORTHERN
NEW YORK, as Executors of the Last Will and Testament
of ELIZABETH M. HAAS, Deceased, and WATERTOWN CEM-
ETERY ASSOCIATION,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Before:

LUMBARD, ANDERSON and OAKES,

Circuit Judges.

Appeal from judgment of the United States District
Court for the Northern District of New York, Edmund Port,
Judge, denying estate tax deduction for bequest to
nonprofit cemetery association as not organized exclusively
for charitable or religious purposes, 26 U.S.C. § 2055.

Affirmed.

HENRY H. WILMOTT, Watertown, N.Y., for *Appellant Na-*
tional Bank of Northern New York.

LAWRENCE CONBOY, CONBOY, MCKAY, BACHMAN & KEN-
DALL, Watertown, N.Y., for *Appellant Watertown Ceme-*
tary Association.

JONATHAN S. COHEN, Attorney, Tax Division, U.S. De-
partment of Justice (James M. Sullivan, Jr., United States
Attorney for the Northern District of New York, Scott P.
Crampton, Assistant United States Attorney, Gilbert E.
Andrews and William A. Whitledge, Attorneys, Tax Divi-

sion, United States Department of Justice, of counsel),
for Appellee.

OAKES, *Circuit Judge:*

This appeal presents the question whether a general
bequest to a non-profit cemetery association is deductible
for estate tax purposes as a bequest to an entity organized
exclusively for charitable or religious purposes. The Na-
tional Bank of Northern New York, as executor of the
estate of Elizabeth M. Haas,¹ and the Watertown Ceme-
tery Association, a principal beneficiary of that estate,
appeal from a judgment of the United States District
Court for Northern District of New York, Edmund Port,
Judge, denying a petition for refund of estate taxes paid
under protest, and dismissing the complaint of Watertown
Cemetery Association for lack of jurisdiction.

Elizabeth M. Haas, who died on January 15, 1966, be-
queathed a large portion of her ample estate to two non-
profit cemetery associations located in northern New York
State. She left \$25,000 to the Grove Cemetery Association
in LaFargeville, New York, partly for the perpetual care
of the Frederick Wetterham [sic] family burial plot.² To
the Watertown Cemetery Association of Watertown, New
York, she bequeathed a 50 per cent portion of her residu-
ary estate, a share which approximates \$2,500,000. The
executor claims that the two cemetery associations are
“charitable” or “religious” entities within the meaning of

¹ The complaint also named Ruth K. Child, co-executor, as a
party plaintiff. Subsequent to the filing of the complaint Ruth K.
Child died, leaving the bank as the sole executor.

² The parties have stipulated that \$2,000 of this amount repre-
sents the actual cost of obtaining perpetual care services at the
Grove Cemetery. The Government does not contest the deducti-
bility of this amount from the taxable estate.

26 U.S.C. § 2055(a)(2)³ and that under that provision the estate is entitled to an estate tax deduction for the two bequests.⁴ The Commissioner rejected the claim. The estate thereupon paid under protest the sum of \$935,096.66 in federal estate taxes and interest on the cemetery bequests. This action was brought for refund of \$916,085.78 of that amount; the remainder has been voluntarily re-

³ 26 U.S.C. § 2055(a) provides in part:

In General.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devices, or transfers . . .

* * *

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office . . .

⁴ The executor also briefly suggests in the alternative that § 2055(a)(3) is the applicable statute. This subsection allows a deduction for gifts given in trust, if *inter alia*, they are used by the trustee exclusively for religious or charitable purposes. Our brother Anderson suggests that while the cemetery associations may not be organized exclusively for charitable or religious purposes as required by § 2055(a)(2), the Haas bequests were to be used exclusively for such purposes, as required by § 2055(a)(3). That is, the money was to be used for cemetery upkeep, not to aid in the sale of plots. In our view, however, the upkeep of a cemetery which does not have an exclusively charitable purpose cannot be said to be an exclusively charitable function. Since our decision will thus depend on the meanings of “charitable” and “religious” as those words are used throughout § 2055(a), and not on the differing wording of subsections (2) and (3), we need not decide whether the Haas bequests are trusts within the meaning of § 2055(a)(3).

funded by the Commissioner. The district court rejected the refund claim, ruling that the cemeteries are not “corporation[s] organized and operated exclusively for religious [or] charitable . . . purposes. . . .” 26 U.S.C. § 2055(a). We affirm.⁵

The executor does not argue that bequests to cemeteries will always qualify for estate tax deduction under § 2055. Such a position would be most difficult to maintain in view of the legislative history of the estate tax and income tax provisions relating to charitable and religious entities. The 1939 Internal Revenue Code did not expressly provide for either income or estate tax deductions for donations to cemetery associations. In 1954, however, the Code was amended to provide an express exemption from the *income* tax for “[c]emetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit” 26 U.S.C. § 501(c)(13). But it is significant that this was done as a *special* exemption, wholly outside the rubric of “charitable” or “religious” status under § 501(c)(3).

At the very same time, 26 U.S.C. § 170(c)(5) was added to make clear that donations to such cemetery associations were specially defined as deductible for the purpose of computing the donee’s *income* tax. This subsection was entirely distinct from the general deduction provision for donations to corporations, trusts and funds “organized and operated exclusively for religious, charitable . . . purposes,” contained in 26 U.S.C. § 170(c)(2)(B). As the Senate Report on the 1954 Code stated, this new provision

⁵ The Government argues, and Judge Port held, that only the taxpayer has standing to bring a “civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected” 28 U.S.C. § 1346(a)(1). Since we affirm the district court’s judgment on the merits on the executor’s appeal, we need not decide the question of the beneficiary’s standing to join the refund litigation.

"extend[ed] the deduction for charitable contributions beyond those allowed under present law to contributions made to nonprofit cemetery and burial companies." S. Rep. on Int. Rev. Code of 1954, 83d Cong., 2d Sess. (1954); 1954 U.S. Code Cong. & Ad. News 4621, 4660.

No similar *estate* tax provision expanding deductibility for bequests to cemeteries either specially or as "charitable" or "religious" contributions has been made by Congress. The estate tax provision regarding such bequests in the 1939 and 1954 Codes is identical in content to the old income tax charitable contribution provision, *see* 26 U.S.C. § 170(c)(2), which the 1954 Congress felt did not extend to include gifts or bequests to cemetery associations. Under the congressional understanding and the prior case law, *see, e.g., Schuster v. Nichols*, 20 F.2d 179, 181 (D. Mass. 1927), it appears that a *per se* rule allowing deduction for bequests to cemetery associations would be "beyond [that] allowed under present law" S. Rep. on Int. Rev. Code of 1954 *supra*.

In this situation, the executor is constrained to argue that the two cemetery association beneficiaries involved in this case serve in the traditional sense as charitable or religious enterprises. As was stated in *Gund's Estate v. Commissioner*, 113 F.2d 61, 62 (6th Cir. 1940) (bequest to association not deductible where no free burial space provided or less than fair value charged for burial or upkeep), *cert. denied*, 311 U.S. 696 (1941), "[a] cemetery association doubtless could be so organized and operated as to be a charitable organization within the meaning of the [Internal Revenue Code]"

The factors relied upon by the executor in the present case, however fall short of such a result. The primary features of an allegedly charitable nature claimed for the Watertown Cemetery Association are that down through the years it has: (a) conveyed a section of lots to the

Volunteer Firemen of Watertown at reduced price, which it has maintained free of charge; (b) in 1871 rehabilitated and has since maintained free of charge the adjacent Old Burrville Burying Ground; (c) in the 19th century contributed over \$9,000 to the construction of an access road from the city limits of Watertown to the cemetery; (d) in 1885 dedicated a plot of 1,100 square feet to the Henry Keep Home, a nonprofit home for aged persons, for burial purposes; (e) in 1872 dedicated a plot of land without charge for the erection of a chapel; (f) has provided temporary winter storage of bodies destined for other cemeteries free of charge; and (g) has maintained a number of burial plots as to which no perpetual care payment was ever made and for which annual assessments are not being paid.⁶ As the district court found, however, "[t]he Cemetery Associations did not make it a practice of providing free burial to indigents, nor is it their 'usual custom' to provide any plots at reduced prices." Here, as in *Bank of Carthage v. United States*, 304 F. Supp. 77, 80 (W. D. Mo. 1969, "[i]t appears the rich, the poor, and the in-between are treated alike." While some of the various functions claimed to be charitable by the cemetery may in fact be so, here as in *Bank of Carthage* "the conclusion is inescapable that the [cemetery's] funds are not used *exclusively for charitable purposes*," as the statute requires. *Id.* (emphasis original). *See also Gund's Estate v. Commissioner, supra*, 113 F.2d at 62; note 3 *supra*.

We cannot accept the broad view of *Dulles v. Johnson*, 273 F.2d 362 (2d Cir. 1959), *cert. denied*, 364 U.S. 834 (1960), espoused by the executor, that if the activity of burying the dead were not undertaken by these and like associations, the cost would devolve upon the public, thereby rendering the associations "charitable" in purpose. In

⁶ No similar specific claims for charitable status for the Grove Cemetery are made on this appeal.

Dulles this court upheld the deductibility of bequests made from the estate of William Nelson Cromwell to various New York bar associations. That opinion surveyed most of the various activities of the associations, including their efforts at regulating improper and unauthorized practice of law, and concluded that "the total operations of the three [associations] . . . are 'charitable, scientific . . . [and] educational' within the meaning of [what is now 26 U.S.C. § 2055]" 273 F.2d at 368. Among the factors there present which inclined the court to its conclusion of charitable status, despite incidental economic benefit to members of the legal fraternity, was that if the regulatory "activities were not undertaken by the Associations, the cost of this necessary regulation would descend upon the public." *Id.* at 366. The executor, however, mistakes this single factual element for the entire rationale of the case. The executor contends that since the cemeteries involved herein relieve the public fisc by the perpetual maintenance of the cemetery grounds—a task assumed in cases of neglect by the local governments, *see* N.Y. County Law § 222-5-a (McKinney 1972); N.Y. Town Law § 291-1 (McKinney Supp. 1975)—the cemeteries are "charitable" within the terms of *Dulles*. In *Dulles*, however, it is clear that substantial "charitable" and "educational" activities of a more traditional sort were continuously being performed by the beneficiary associations: "maintaining libraries for legal research, sponsoring lectures and forums on the law, providing free legal service through participation in legal aid, and providing low cost legal service through participation in a legal referral system." 273 F.2d at 367-68. In our view, *Dulles* should be read for the proposition that public dedication of services by an organization may be colored by a history of that organization's performance of more traditional charitable activities to such an extent that the entire enterprise, or the "total operations" of the association, *id.* at 368, assume the aspect of charitable

service to the community.⁷ The activities which are not charitable or educational, *e.g.*, social or economic, must be merely "auxiliary" or "incidental in nature." *Id.* By concentrating solely on the factor of relieving public expense, we believe the executor has overlooked the complex of factors upon which the *Dulles* opinion was based. Relief of general tax burdens alone, in a society with some progressivity in its tax structure, cannot be deemed a single, inalienable mark of charity.

Our view is that relief for the public fisc is more symptomatic than evidentiary regarding whether an activity is charitable: charity often results in an absorption of a burden otherwise falling upon the state, particularly where the social welfare is a principal purpose of the state. But this does not mean that activities lessening public expense in any of a myriad of areas of public interest are perforce charitable.

The activities of the associations in this case are not, as in *Dulles*, historically infused with such charitable functions as the provision of needed services for free, or at low cost, for those who cannot otherwise afford them. *See also Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278, 1288-89 (D.C. Cir. 1974) (Revenue Ruling 69-545 allowing nonprofit hospitals to qualify as "charitable" for income tax purposes upheld), *vacated and*

⁷ In this regard, *see also Schuster v. Nichols*, 20 F.2d 179, 181 (D. Mass. 1927):

The position of the word "charitable," in a sentence including religious, scientific, and educational purposes, all of which would be regarded as charitable purposes under the statute of 43 Eliz., points irresistibly to the conclusion that Congress was here using the word "charitable" in its more narrow and restricted sense, as signifying those corporations which were organized and maintained exclusively for eleemosynary purposes.

remanded on other grounds, 44 U.S.L.W. 4724 (U.S. June 1, 1976). Nor is the noncharitable function or activity, the sale of burial plots, merely "incidental" or "auxiliary." In this context, we find that the executor has failed to sustain the qualification of the cemeteries as charitable entities under § 2055.

Judge Port was also correct in holding that the two cemetery associations do not qualify as "religious" entities under § 2055. Here, as in the case of "charitable" status, it must again be assumed that a cemetery could be so organized as to constitute a "religious" entity under the estate tax provisions, 26 U.S.C. § 2055(a). Cf. *Gund's Estate v. Commissioner*, *supra*. In fact, we have been informed on argument of this case that many cemeteries directly associated with and under the supervision of particular churches have been treated by the Commissioner as "religious" activities for purposes of § 2055, even though church or church-owned burial plots are not given free of charge except to occasional indigents. See *Also Estate of Elizabeth L. Audenreid*, 26 T.C. 120 (1956). The executor claims that Grove Cemetery and Watertown Cemetery should be similarly treated, despite their lack of religious affiliation, because burial in general serves a religious purpose. While burial may, in many or most instances, serve a religious function, not 9 *infra*, the fact remains that the cemetery associations in this case do not themselves perform that function. The district court found that "[a]ny prayers or religious ceremonies performed in connection with the burial are performed by clergymen or others in no way associated with the Cemetery Associations." Furthermore, neither of these associations make religious belief or religious services a requirement for burial in their cemeteries. Thus neither directly nor indirectly have these cemeteries presumed to dedicate their services to an ex-

press religious function.⁸ This distinguishes these cemeteries from those which operate under the ownership and supervision of particular churches, and are affiliated with the religious objectives of those churches. We believe Judge Port has properly applied the distinction which Congress has set forth.⁹ We do not understand the executor to argue that such a distinction, long present within the tax laws of the United States, is unconstitutional. See *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 672-80 (1970). Accordingly, we affirm the judgment of the district court, leaving to congressional wisdom the apparent anomaly establishing different treatment of nonprofit cemetery associations for income and estate tax purposes.

Judgment affirmed.

⁸ The possibility, of course, remains that the officers of the associations subjectively intend that their cemeteries serve a religious function. They may feel that their open-mindedness regarding the persons and procedures for burial in their cemeteries itself serves the religious spirit of open brotherhood among men, see note 9 *infra*. This, however, is too remote to provide for recognition as a "religious" entity under 26 U.S.C. § 2055. Many people may conduct their affairs in a religious spirit; the thrust of the tax exemption for religious activities is aimed, no doubt, at form as well as content. See *Scripture Press Foundation v. United States*, 285 F.2d 800 (Ct. Cl. 1961) (corporate charter insufficient to assure that profits from sales of religious books are applied to religious purposes), *cert. denied*, 368 U.S. 985 (1962).

⁹ The *per se* argument is also made that burial as such is a religious function, a Christian act of piety, which, originally performed by the churches, came by virtue of denomination to be performed by civil governments and voluntary corporations. In this respect, burial of persons without religious affiliation or with views antagonistic to religion, is suggested, is either "charitable" in nature, a function of American "civil religion," or simply a part of the Christian tradition in our society. See M. Gatch, *Death: Meaning and Mortality in Christian Thought and Contemporary Culture* (1969). This argument is, we think, better addressed to Congress than to the courts.

ANDERSON, *Circuit Judge*, dissenting:

I dissent from the holding of the majority in this case because the statutes, regulations and cited decisions, as interpreted and applied in this case, produce a result which is manifestly arbitrary, unfair and unjust and which does not afford equal protection of the law.

I must concede at the outset, however, that the majority opinion, parallels the weight of authority as expressed in prior tax court and reviewing court decisions in this area of the tax law. Only one other Court of Appeals, however, has ruled on the precise issue in a thirty-six year old decision, *Gund's Estate v. Commission*, 113 F.2d 61 (6 Cir.), *cert. denied*, 311 U.S. 696 (1940), which does not reflect "the changing economic, social and technological precepts and values of contemporary society." *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278, 1288 (D.C. Cir. 1974), *vacated on other grounds*, 44 U.S. L.W. 4724 (U.S., June 1, 1976);¹ see also *Green v. Connally*, 330 F. Supp. 1150, 1159 (D.D.C.) (three-judge court), *aff'd mem.*, 404 U.S. 997 (1971); IV Scott, Trusts § 368, at 2855-56 (1967). Even the *Gund's Estate* court recognized that despite its holding on the facts before it, "A cemetery association doubtless could be so organized and operated as to be a charitable organization within the meaning of the act" 113 F.2d 61, 62.

¹ The "other grounds" on which *Eastern Kentucky Welfare Rights Organization v. Simon* was vacated by the Supreme Court, were that the plaintiffs in that case lacked standing to attack the validity of the Revenue Ruling there in issue. While I would be reluctant in light of this disposition of the case to rely directly on the D. C. Circuit's holding, this should not preclude reference to that court's reasoning. The D. C. Circuit's opinion on the merits was rendered after a careful consideration and rejection of several jurisdictional arguments made by the Government, see 506 F.2d at 1282-86.

I offer three highly relevant considerations. First, this court has stated that an organization may be classified as one organized and operated exclusively for charitable purposes if it performs functions which, absent the organization, "would descend upon the public," i.e., on government. *Dulles v. Johnson*, 273 F.2d 362, 366 (2 Cir. 1959), *cert. denied*, 364 U.S. 834 (1960); see also *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581 (1924); *St. Louis Union Trust Co. v. United States*, 374 F.2d 427, 432 (8 Cir. 1967); *McGlotten v. Connelly*, 338 F. Supp. 448, 456 (D.D.C. 1972) (three-judge court). The Treasury Regulations which define "charitable" for purposes of Internal Revenue Code § 501 (c)(3) expressly recognize that activities "lessening the burden of Government" may bring an organization within that definition. U.S. Treas. Regs. § 1.501(c)(3)-1(d)(2).² Although these are definitions which, as the Government argues here, could potentially expand the concept of "charitable", a contrary decision here would not go beyond what is fair and just and it is plainly within the public interest to do so. It seems clear that, were it not for cemetery associations, such as Grove and Brookside (formerly Watertown), responsibility for maintaining burial grounds would devolve upon the government. This would be a matter of both public health, cf. *Starr Burying Ground*

² Internal Revenue Code §§ 170(c) (defining organizations, contributions to which may be deducted for income tax purposes), 501(c)(3) (defining charitable, religious, and educational organizations exempt from income tax), and 2522 (defining organizations, contributions to which fall within the gift tax charitable deduction), have virtually identical wording to that of § 2055(a). As the Government correctly notes in its brief, these four statutory sections are all subject to the same definition of "charitable." Thus, the Treasury Regulations promulgated under § 501(c)(3) are relevant to the definition of "charitable" under § 2055(a). Similarly, cases defining "charitable" for purposes of §§ 170(c), 501(c)(3), and 2522, some of which are cited herein, are relevant to the problem of defining "charitable" for purposes of § 2055(a).

Association v. North Lane Cemetery Association, 58 A. 467, 469, 77 Conn. 83 (1904), and general civil responsibility.

Indeed, New York law provides that:

“Upon the adoption of a resolution therefor, the town board may construct and maintain permanent improvements in any one or more of the classes of cemeteries described herein and may acquire, by purchase or condemnation, additional lands for cemetery or burial ground purposes, whenever in the judgment of the town board it is necessary or advisable that such improvements be made or additional lands be acquired.” N.Y. Town Law § 291.3 (emphasis added).

This statute recognizes that, if organizations, such as Grove and Brookside, prove unable to continue proper maintenance of their burial grounds, either the town or the county in which they lie would have to take over this responsibility.³ Because annual maintenance assessments

³ The record in this case establishes that, when Watertown Cemetery Association was organized, it in fact relieved the Village of Watertown of the necessity of maintaining a village cemetery. Between 1824 and 1853, the Village held and maintained a public cemetery. In the latter year, the Village trustees recognizing that the existing cemetery was nearing its capacity, obtained an option to purchase additional land. This option provided that if a cemetery association were formed and the Village decided not to purchase the land, the cemetery association could do so. Watertown Cemetery Association was incorporated in 1853 for the sole purpose of procuring and holding lands to be used exclusively for a cemetery. Prior to the meeting of the Village electors to decide whether the Village should buy the new cemetery site, the Village trustees prepared, and distributed to the electors, and published in a local newspaper, a letter, signed by the Village President, stating that

“if the Association should finally determine to go on, the Trustees will most cheerfully abandon the project, as they do not

are not now paid, and perpetual care assessments never were paid, for a number of lots; and because perpetual care assessments paid in years past for other lots do not currently produce sufficient income to pay the costs of upkeep, it follows that gifts and bequests, such as those presently at issue, are crucial to the cemetery associations' continued ability to maintain the burial grounds, and thus prevent this responsibility from falling to the county or town governments.

Second, it is generally acknowledged that one means of ascertaining whether an organization or its activities may be deemed “charitable,” for tax law purposes, is by analogy to the common law of charitable trusts. *Green v. Connally*, *supra*, 330 F. Supp. at 1157-58, quoted in *Eastern Kentucky Welfare Rights Organization v. Simon*, *supra*, 506 F.2d at 1287; *Girard Trust Co. v. Commissioner*, 122 F.2d

desire to add to the burdens of the Village unless it becomes necessary.”

The electors defeated the proposal to purchase the land; immediately thereafter, it was acquired by the Watertown Cemetery Association, which has owned and maintained it as a cemetery to this day. The Village owns and operates no cemeteries for new burials, although it continues to maintain the original cemetery that it operated from 1824 to 1853, but which has long since been filled to capacity. A clearer case of “lessening the burdens of Government” is difficult to envision. See also N. Y. Town Law § 291.1 (Supp. 1975-76), and N. Y. County Law § 222.5(a).

Although § 291.1 contains the phrase, “other than private burial grounds,” the Attorney General of New York has rendered an opinion stating that a town board must provide care for all cemeteries located in the village except those presently controlled by an existing board or corporate body and for the care of which there exists no special fund or endowment, regardless of the ownership of said cemeteries or whether they have been or are used as private burial grounds. 1974 Op. Atty. Gen. 100. See also 23 Op. State Compt. 629 (1967) (town board under duty to care for all cemeteries located in the town except those presently controlled by an existing board or corporate body).

108, 109 (3 Cir. 1941). The majority omits any consideration of the common law as it relates to charitable trusts and appears to consider the tax code as if it were as immutable as the law of the Medes and Persians. I do not question the fact that federal statutes and regulations may and do supplant common law principles and rules; but I am attacking the federal policy which produced statutes and regulations which, as applied to the circumstances of the present case, are so grossly unfair and unjust. The experience of mankind over a period of centuries as reflected and embodied in the common law has not been abolished, and it is still of compelling value to weigh that experience and its resultants against the tax policy applied in the present case, which is so plainly at odds with the public interest.

With this in view we pose the pertinent question: at common law would a bequest in trust for maintaining a cemetery have been deemed charitable, and thus accorded perpetual existence, or would it have been ruled void as in violation of the Rule Against Perpetuities? Careful study of the common law shows that the Haas bequests would be deemed "charitable." Underlying the law of trusts is the concept that a charitable trust is one formed to serve the general welfare and to be beneficial to the community. Restatement 2d, *Trusts*, § 374; IV Scott, *Trusts* § 374, at 2903 (1967); *Green v. Connally*, *supra*, 330 F. Supp. at 1158-59, and authorities discussed therein. This underlying characteristic has been recognized by this court in the § 2055(a) context, *Dulles v. Johnson*, *supra*. The maintenance of cemetery facilities by private or quasi-public associations benefits the community both through its aesthetic effects, see, e.g., *In re Byrne's Estate*, 100 A.2d 157, 159, 98 N.H. 300 (1953), and by the performance of a necessary social task, see *Metairie Cemetery Association v. United States*, 282 F.2d 225, 228 n. 8 (5 Cir. 1960); *Chapman v. Newell*, 125 N.W. 324, 327, 146 Iowa 415 (1910);

Starr Burying Ground Association, *supra*; Anno., 47 A.L.R. 2d 596, 612 (1956).

At common law, a bequest for the erection or maintenance of a private, individual tomb, grave, or monument ordinarily did not create a charitable trust. IV Scott, *Trusts*, § 374.9 at 2924 (1967); Restatement 2d, *Trusts*, § 374 comment h; *Gold v. Price*, 211 S.E.2d 803, 804, 24 N.C.App. 660 (1975); *Earney v. Clay*, 516 S.W.2d 59, 67 (Mo. Ct. App. 1974); *Driscoll v. Hewlett*, 116 N.Y.S.2d 466, 132 A.D. 125 (2d Dept. 1909), *aff'd*, 198 N.Y. 297, 91 N.E. 784 (1910); *Green v. Hogan*, 27 N.E. 413, 414, 153 Mass. 462 (1891); but see *In re Byrne's Estate*, *supra*. On the other hand, a bequest for the creation or upkeep of a "public" cemetery would create a charitable trust. IV Scott, *supra*, § 374.9, at 2925; Restatement 2d, *Trusts*, comment h; *Johnson v. South Blue Hill Cemetery Association*, 221 A.2d 280, 287 (Maine 1966). See also Anno., 47 A.L.R.2d 596, *supra*. The bequests to Grove and Brookside obviously fall between these two polar cases, but there is substantial authority for the proposition that these bequests *would* create charitable trusts under the common law. For example, in *Catholic Bishop of Chicago v. Murr*, 120 N.E.2d 4, 7, 3 Ill.2d 107 (1954), Chief Justice Schaefer wrote:

"There is a recognized difference between establishing a trust for the upkeep of a private grave and donating land for use as a cemetery The public character of the latter is precisely the factor which distinguishes a charitable from a private trust [R]estriction upon sectarian adherence and geographical residence does not, under our decision, make the trust too limited in benefits to be characterized as charitable."

Newton v. Newton Burial Park, 34 S.W.2d 118, 326 No. [sic] 901 (1931), involved a bequest in trust, with income to be used by a cemetery corporation to build a chapel, and to beautify and maintain the cemetery. The cemetery had

been established for the burial of white persons; burial lots were sold at a price sufficient to pay the expenses of maintaining the cemetery, and any excess funds were used to make additional improvements. The Missouri Supreme Court held that the bequest created a charitable trust and did not violate the Rule Against Perpetuities. See also *Opinion of the Justices*, 133 A.2d 792, 794, 101 N.H. 531 (1957); *Pope v. Alexander*, 250 S.W.2d 51, 53-55, 194 Tenn. 146 (1952); *Davie v. Rochester Cemetery Association*, 23 A.2d 377, 378, 91 N.H. 494 (1941); *Chew v. First Presbyterian Church*, 237 F. 219 (D. Del. 1916); *Bliss v. Linden Cemetery Association*, 87 A. 224, 225, 81 N.J. Eq. 394 (1913); but cf. *Hopkins v. Grimshaw*, 165 U.S. 342, 352-53 (1897) (dictum).

In *Parker v. Fidelity Union Trust Co.*, 63 A.2d 902, 2 N.J.S. 362 (1944), the court, after a lengthy citation and discussion of authorities, held that bequests for the care, maintenance, or improvement of a "public or semipublic" burial ground are charitable in nature, and stated that such bequests are "uniformly" considered to be thus. The court further stated that a cemetery, even though maintained by a private corporation, may fairly be deemed a public burial ground (and bequests for its upkeep therefore may be deemed charitable), if it is open, under reasonable regulations, to the use of the public for the burial of the dead. 63 A.2d at 917. (The cemetery in the *Parker* case had been operated by a private individual who sold burial lots therein to the general public, as a private enterprise.) Such is apparently the case here. There is no indication that any person is refused burial in these cemeteries on any grounds other than non-payment of the purchase price of a lot or other normal fees. Rather, the record shows that there are no restrictions on burials in Brookside and that it refuses burial to no one. Cf. N.Y. Not-for-Profit Corporation Law § 1401(a).

There are hundreds of cemetery associations in this country similar to Watertown Association. They are non-

profit, voluntary organizations incorporated under state statutes, for the purpose of creating a legal entity dedicated to providing and maintaining a decent burial place for deceased persons. Historically they have been supported by modest charges for sales of lots; and also by gifts or bequests of \$100 to \$500 for "perpetual care," sums held in trust by the association for the purpose. Vastly increased costs of labor and materials to keep the cemetery cared for and maintained and the reduced value of the dollar have made it increasingly difficult for these associations to carry out their functions. They render a great public benefit at no cost to the public treasury and clearly come within the general concept of a charitable use, even from the point of view of the tax law.

Third, it is irrational and a denial of equal protection of the laws to exempt bequests to cemeteries which are owned and operated by churches, and at the same time deny the exemption to bequests to cemeteries such as Grove and Brookside.⁴ Although it could be argued that the exemption for bequests to church cemeteries is based on their religious nature (see *Estate of Elizabeth L. Audenried*, 26 T.C. 120 (1956)), and not on their charitable nature, this is a distinction without a difference. Both Church cemeteries and private cemeteries perform substantially the same functions. Indeed, it is stipulated in this case that:

"Watertown Cemetery Association and Grove Cemetery Association, with regard to their cemeteries, and municipalities and religious organizations, with regard to their cemeteries, perform the same general function

⁴ I assume, on the authority of *Estate of Elizabeth L. Audenried*, 26 T.C. 120 (1956), which appears to be the only reported case on point, that an estate tax exemption is routinely available and taken for bequests to church owned cemeteries. In general the statements made herein about the characteristics and activities of church owned cemeteries are based on common knowledge.

of providing and maintaining a place for the burial of the dead.”

The record also shows that two church owned cemeteries, presumably exempt under § 2055(a), lie adjacent to Brookside. I see no significant “religious” purpose in the fact that a church cemetery is owned and operated by a church, and/or is physically located on church grounds. The fact that the cemetery associations do not actually perform the religious burial service is irrelevant because this is not an activity related to the ownership, operation, and maintenance of the cemetery, as such. In any event, full religious burial ceremonies and other attendant rites can be and are performed at the private cemeteries.⁵

As to the charitable purposes of the two types of cemeteries, I am aware of no activities in which the typical church cemetery would engage, in its operation of the cemetery, which is not carried out by cemetery associations such as Grove and Brookside. A burial plot in a church yard or church owned cemetery is not granted free of charge except perhaps to occasional indigents. Also, a church, as do the associations here involved, generally will continue to maintain those lots whose perpetual care or annual assessments no longer provide sufficient income.

Congress has wide latitude in levying taxes; and constitutional restrictions on its decision to tax or not tax particular entities should be narrowly limited. *Fernandez v. Wiener*, 326 U.S. 340 (1946); *Helvering v. Gerhardt*, 304 U.S. 405, 416 (1948); *Helvering v. Independent Life Insurance Co.*, 292 U.S. 371, 381 (1934); *Flint v. Stone Tracy*

⁵ The district court’s point that “the Cemetery Associations refused burial to no one and . . . an atheist would absolutely be allowed burial in the Cemeteries involved,” is so specious as not to require comment, save to point out that the Associations’ policies of refusing burial to no one enhances their claim to “charitable” status.

Co., 220 U.S. 107, 158-62 (1911). Cf. *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974); *Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974) (local and state taxing powers). Here, of course, the distinction between church cemeteries and private association cemeteries is not necessarily based on a clear legislative mandate, but is more a matter of administrative and judicial interpretation of the tax laws. Nevertheless, to allow a § 2055(a) exemption for bequests to church owned cemeteries, but not for bequests to private, non-profit cemetery association cemeteries, when these entities are indistinguishable in purpose and function, raises, in my view, clear equal protection problems.

It might, of course, be argued that these cemetery associations are not, as § 2055(a)(2) requires, “organized and operated *exclusively* for” exempt purposes. As a general matter, “the presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of the exempt purposes.” *Contracting Plumbers Cooperative Restoration Corp. v. United States*, 488 F.2d 684, 686 (2 Cir. 1973), *cert. denied*, 419 U.S. 827 (1974); see also *Better Business Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279, 283 (1945). Looking at the organization’s total operations, the non-exempt activities must be no more than incidental in nature. *Dulles v. Johnson*, *supra*, 273 F.2d at 368. Therefore it might be further claimed that the cemetery associations’ sale of burial lots to private individuals constitutes a “single substantial non-exempt purpose.” But the mere fact that lots are sold should not be controlling. As already noted, church owned cemeteries also customarily charge for burial lots, and yet the taxing authority considers them exempt. Further, payments for products or fees for services do not result in the loss of charitable status in other contexts. A leading example is the case of non-profit hospitals, which under Revenue Ruling 69-545 are accorded charitable status per Internal Revenue Code § 501(c)(3) so long as they “operat[e] an emergency room

open to all persons and . . . provid[e] hospital care for all those persons in the community able to pay the cost thereof either directly or through third party reimbursement" (Emphasis added.) The validity of this Revenue Ruling was upheld by the D.C. Circuit in the *Eastern Kentucky Welfare Rights Organization* case, and although that decision was vacated by the Supreme Court on the grounds that the plaintiffs lacked standing to challenge 69-545, the validity of that Revenue Ruling must be presumed until a contrary judicial decision on the merits is rendered.

Although the Watertown Cemetery Association charges a reasonable sum for burial lot and upkeep and receives payment for indigents from the County Commissioner of Social Services, it maintains, out of general funds, those lots for which specific fees and assessments are no longer sufficient to cover maintenance costs. Insofar as the common law of charitable trusts is again illuminating, it is stated in IV Scott, Trusts, *supra*, § 376, at 2966, that:

"A trust to establish or maintain an institution may be charitable, however, although it is provided that some or all of the persons to receive benefits from the institution are to pay fees or otherwise contribute to the expense of maintaining the institution."

See also *Gingrich v. Blue Ridge Memorial Gardens*, 282 A.2d 315, 318, 444 Pa. 420 (1971).

As the majority opinion states, donations to cemetery associations are deductible for the purpose of the federal income tax and for the gift tax. The property and income of such associations are in most, if not all states, exempt from property, income, and succession taxes. It is certainly an anomaly that the federal estate tax regulations continue to refuse to grant exemptions to portions of estates left to cemetery associations. At least, the regulations should define the uses and functions of funds left to such associations which will qualify them for an exemption.

The plaintiffs-appellants argued below that the bequest to Watertown Cemetery Association was in trust, because only the income could be used, and it thus comes within § 2055(a)(3), rather than § 2055(a)(2), but the district court did not rule on this claim. This point is important, particularly on the exclusivity issue. When, on the one hand, a bequest is made *directly* to an organization, § 2055(a)(2) requires that it be a "corporation organized and operated exclusively for" charitable, etc., purposes. When a bequest is made in trust, on the other hand, it must satisfy § 2055(a)(3), which requires that the trustee is to use the bequest "exclusively" for charitable, etc., purposes. Thus, a bequest is deductible from the gross estate, under § 2055(a)(3), if it is made to a trustee *not* organized and operated exclusively for exempt purposes, so long as the trustee is required to use the bequest exclusively for exempt purposes. *Kaplun v. United States*, 303 F. Supp. 733 (S.D.N.Y. 1969), *aff'd* 436 F.2d 799 (2 Cir. 1971).

Here, the bequest to the Watertown Cemetery Association was for the use of its "Endowment Fund;" the bequest to Grove Cemetery Association was to "be used in the general care of the Cemetery." If the evidence shows, as a matter of fact, that these bequests were directed exclusively to the maintenance and upkeep of the respective cemeteries, or that any slight benefit accruing from the sale of lots to either of the cemetery associations was "no more than incidental in nature," *Dulles v. Johnson, supra*, 273 F.2d at 368, the court must hold that, as the Associations only use the bequests for maintenance and upkeep of the cemetery, they are therefore used exclusively for a charitable purpose, even though the trustee (the cemetery associations) also engage in the non-charitable activity of selling burial lots as an incidental activity. Under these circumstances an exemption under § 2055(a)(3) should be allowed.

I am of the opinion that the judgment of the district court should be reversed on the ground that the bequests

to the cemetery associations should have been held deductible from the gross estate as charitable dispositions under § 2055(a) of the Internal Revenue Code of 1954. In the alternative the case should be ordered remanded to the district court for further evidence, findings and conclusions as to whether the bequests were made to the plaintiffs-appellants in trust under § 2055(a)(3) and were designed to be used by the trustees exclusively for charitable purposes. Moreover, as there is no record evidence (but only assumptions of common knowledge) concerning the operations of church owned cemeteries, bequests to which are held to be exempt from the estate tax, other than in the stipulation of facts, the case must also be remanded for the taking of further evidence and the making of findings and conclusions regarding the issue of whether there are substantial, legally significant distinctions between the activities of such church owned cemeteries and those of the Grove and Watertown Cemetery Associations.